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No. 91-586

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMAL A. KAHOK, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrants in this case satisfied the particularity requirement of the Fourth Amendment.
2. Whether the district court made a *de novo* determination as to those portions of the magistrate's report to which petitioner objected.
3. Whether the magistrate's denial of petitioner's request for production of witness notes and interview memorandums at a suppression hearing violated the Due Process Clause.

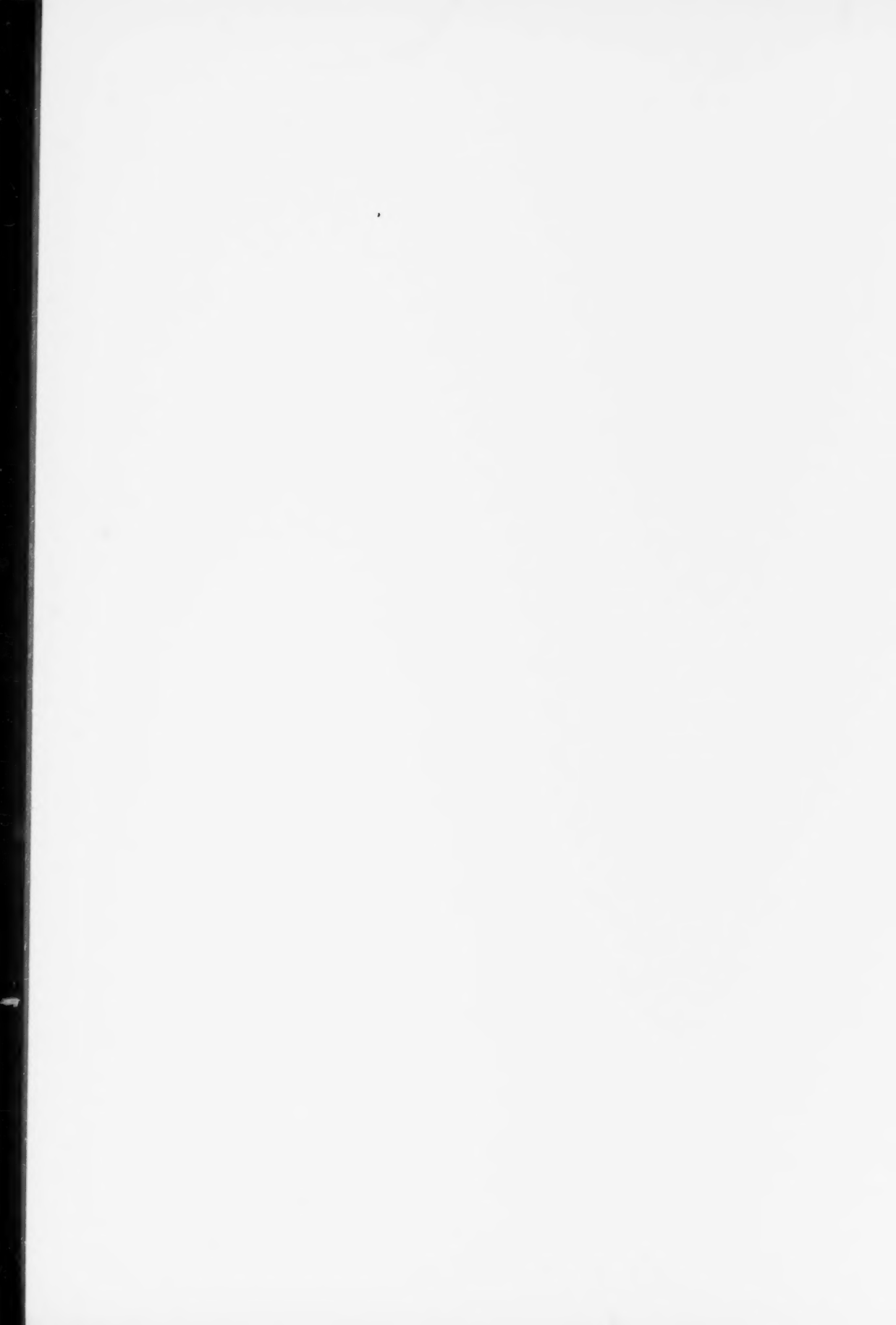


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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported, but the judgment is noted at 943 F.2d 1318 (Table). The order of the district court (Pet. App. 12a) adopting the magistrate's report and recommendation (Pet. App. 2a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1991. The petition for a writ of certiorari was filed on October 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement in which he reserved the right to appeal the denial of his motion to suppress evidence, petitioner pleaded guilty to one count of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to 48 months' imprisonment. The court of appeals affirmed. Pet. App. 1a.

1. Petitioner was charged with willfully attempting to evade income taxes for the year 1982, 1983, and 1984, in violation of 26 U.S.C. 7201, and with willfully making and subscribing a false 1984 corporate income tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 41a-44a. After indictment, petitioner filed a motion to suppress evidence that was obtained as a result of three warrant-authorized searches. Petitioner's motion alleged that affidavits filed by an IRS special agent in support of the warrants contained allegations that the agent knew or should have known were false.¹ Petitioner also contended that the warrants failed to describe the items to be seized with sufficient particularity. Pet. App. 11a.

2. The district court referred petitioner's motion to a magistrate. Pet. App. 2a. The magistrate conducted a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and issued a report and recommendation that petitioner's suppression motion be denied. Pet. App. 2a-11a. The magistrate found that the testimony of petitioner's witnesses at the hearing was "not only woefully lacking in substance, it was woefully lacking in truth." Pet. App. 10a. The mag-

¹ One of the affidavits is reproduced at Pet. App. 22a-40a. The affidavits supporting the other two warrants were basically the same. Pet. App. 3a.

istrate found that the testimony of one witness "was replete with conflicts and inconsistencies," Pet. App. 7a, and recommended that the government pursue perjury charges against another witness. Pet. App. 10a. The magistrate also rejected petitioner's contention that the search warrants were too general. The magistrate observed that an investigation of complex crimes may require review of large numbers of documents, and that "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection." Pet. App. 11a (quotations omitted).

On February 22, 1990, petitioner filed objections to the magistrate's report and a motion for a new hearing. On February 23, 1990, the District Court entered an order adopting the magistrate's report and denying petitioner's motion to suppress. Pet. App. 12a.

3. On petitioner's appeal from his conviction, the court of appeals affirmed without opinion. Pet. App. 1a.

ARGUMENT

1. Petitioner contends (Pet. 9-18) that the search warrants did not describe the items to be seized with sufficient particularity. In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). "It is universally recognized," however, "that the particularity requirement must be applied with a practical margin of flexibility, * * * and that a description of property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit." *United States v.*

Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). See also *United States v. Strand*, 761 F.2d 449, 453 (8th Cir. 1985); *Shaffer v. Wilson*, 523 F.2d 175, 180 (10th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

The search warrants in this case authorized the government to search at three specified locations for "[b]ooks, records, journals, ledgers, bank statements, receipts, invoices, documents, cancelled checks, and other items" relating to petitioner and other named persons and entities "evidencing the obtaining, transferring, and/or concealment of income, expenses, assets and expenditures of money, which are fruits, evidence o[r] instrumentalities of criminal offenses * * *, namely [income tax evasion (26 U.S.C. 7201), subscribing to a fraudulent return (26 U.S.C. 7206(1)), and conspiracy to defraud the United States by impeding the Treasury Department in the collection of income taxes (18 U.S.C. 371)]." Pet. App. 18a, 20a-21a.² The warrants further stated that "[d]ocumentary evidence is limited to the period from January 1, 1980 through and including" September 31, 1985, or December 31, 1985. Pet. App. 18a, 21a. The search warrants thus restricted the search to records that concerned specific persons and entities, particular types of transactions and activities, a limited time period, and specified criminal offenses.

The warrants were framed as narrowly as possible to allow the government to investigate petitioner's alleged criminal activity. This Court has recognized that proof of complex white collar criminal schemes

² The third warrant in this case, which is not reproduced in petitioner's appendix, is similar to the other two.

often requires investigators to examine and assemble many bits of evidence "[l]ike a jigsaw puzzle." *Andresen v. Maryland*, 427 U.S. 463, 481 n.10 (1976). In such cases, "the whole 'picture' of the illegal scheme can "be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little." *Ibid.* The affidavits in this case described an extensive and complex scheme of fraud and evasion. According to the affidavits, petitioner kept two sets of books, Pet. App. 26a-27a, 29a-30a; failed to report about \$30,000 per month in fraudulent coupon redemptions, Pet. App. 32a-34a; made false statements to investigators concerning the ownership of business properties as part of a conspiracy to impede the IRS, Pet. App. 36a-38a; and provided investigators with a phony contract that grossly understated the purchase price of a grocery store. Pet. App. 37a-38a. Given the complexity and extent of these alleged activities, and the evidence that petitioner had engaged in massive falsification of business records, the search warrants were as specific as it was possible for them to be.

Petitioner asserts (Pet. 11) that the warrants should have restricted the searchers to documents relating to income. But the government needed information concerning petitioner's assets, expenses, and expenditures to reconstruct his tax liability and to trace the steps petitioner took to hide his income and assets. Petitioner's assertion (*ibid.*) that the government lacked probable cause to seize documents relating to Jamal & Brothers, Ltd., ignores evidence that petitioner had diverted business receipts to Jamal & Brothers, Ltd., and then attempted to mislead an IRS agent about the source of the diverted funds. See Pet. App. 34a-35a. Petitioner also sug-

gests (Pet. 7, 9) that the IRS should have used documents already in its possession to limit the scope of the search, or should have excluded those documents from the scope of the search. But the scope of the warrants was justified in light of evidence that petitioner had provided falsified documents to investigators and had engaged in wholesale fabrication of business records. See Pet. App. 38a.

Because the search warrants were as specific as possible, petitioner errs in asserting (Pet. 9-13) that "the decision in this case conflicts with numerous decisions holding that the description of the items to be seized in a search warrant must be as specific as possible under the circumstances."³ Moreover, there is no basis for petitioner's contention (Pet. 14-18) that the courts of appeals are in conflict over the application of an asserted "exception" to the particularity requirement for businesses that are "permeated with fraud." The courts below did not purport to rely on any such "exception." Moreover, the cases cited by petitioner (see *ibid.*) do not recognize an exception to the particularity requirement, but merely apply the rule that search warrants must be as specific as possible under the circumstances. See, *e.g.*, *United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374 (9th Cir. 1983) (upholding warrant where it is not possible to segregate records evidencing fraud from other records), cert. denied, 465 U.S. 1021 (1984); *United States v. Brien*,

³ That is also the standard applied in the Eleventh Circuit. See *United States v. Santarelli*, 778 F.2d 609, 614 (1985). Thus, even if petitioner were correct in arguing that the warrants in this case were too general, he would not be correct in arguing that there is a circuit conflict over the applicable legal standard.

617 F.2d 299, 309 (1st Cir.) (same), cert. denied, 446 U.S. 919 (1980).

Finally, petitioner is incorrect in asserting (Pet. 17) that the facts of this case are indistinguishable from those of *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989), and *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982). The warrant in *Cardwell*, unlike the warrant in this case, contained no limitations on the nature of the documents to be seized so long as they constituted evidence of violations of 26 U.S.C. 7201. Moreover, the government's investigation in *Cardwell* focused on particular portions of the defendant's business records that could have been, but were not, described in the warrant. 680 F.2d at 77-78. The warrant in *Stubbs* "was even less descriptive than the warrant[]" in *Cardwell*, because "[i]t contained no reference to any criminal activity." 873 F.2d at 212. And in *Stubbs*, unlike in this case, the court concluded that the government was in a position to describe the items to be seized with greater particularity.¹ *Id.* at 211.

¹ Petitioner also urges the Court to grant certiorari to resolve alleged circuit conflicts over whether an affidavit that is not physically attached to a search warrant may limit the scope of a warrant that is otherwise too general, Pet. 18-19, and whether the good faith exception to the exclusionary rule applies to facially invalid warrants, Pet. 20-24. These issues are not properly presented, because they were not considered or decided by the courts below. Those courts decided only that the warrants themselves met the Fourth Amendment requirement of particularity. The government did not suggest that the warrants could be limited by the affidavits, and it mentioned the good faith issue only in a footnote in its brief in the court of appeals. See Gov't C.A. Br. 22 n.13. If the court of appeals had relied on the good faith exception, it would have remanded for further proceedings rather than

2. Petitioner also contends (Pet. 24-26) that the district court failed to comply with 28 U.S.C. 636(b)(1)(B), which requires the court to make a *de novo* determination of those portions of the magistrate's report to which petitioner files a written objection. Petitioner's statement (Pet. 25) that "the order of the district court did not indicate that a *de novo* review of the transcript was conducted" is incorrect. The district court's order states that the court "reviewed the Magistrate's report and the record in this cause." Pet. App. 12a. The record of the case includes the transcript of the suppression hearing.

Petitioner is also incorrect in asserting (Pet. 25) that "a meaningful *de novo* review could not have been conducted" in this case. The magistrate's report was filed on January 30, 1990. The transcript was filed on February 16, 1990. Thus, the district court had ample time to familiarize itself with the record and the report prior to the filing of petitioner's objections on February 22, 1990. Furthermore, the district court's order states that "[t]his cause is before the court on the [Magistrate's] Report and Recommendation * * * and defendant's objections filed on February 22, 1990." Pet. App. 12a. Thus, there is no basis in the record for concluding that the district court failed to review the transcript and petitioner's objections to the magistrate's report.

Petitioner's reliance on *United States v. Elsoffer*, 644 F.2d 357 (5th Cir. 1981), is misplaced. In *Elsoffer*, the district court's order did not mention

simply affirming the order. See *United States v. Accardo*, 749 F.2d 1477, 1481 (11th Cir.), cert. denied, 474 U.S. 949 (1985), appeal after remand, *United States v. Norton*, 867 F.2d 1351 (11th Cir.), certs. denied, 491 U.S. 907, 493 U.S. 871 (1989).

the record or the transcript, and a conversation between the district court and defense counsel suggested that the district court had not read the transcript. 644 F.2d at 359 & n.1. The court of appeals remanded because it was "left with uncertainty as to whether the district court read the transcript of the hearing on the motion to suppress." *Id.* at 359. In this case, in contrast, there is no such uncertainty.

3. Finally, petitioner contends (Pet. 26-27) that his due process rights were violated when the magistrate refused to order production of an IRS agent's notes and memorandums of interviews between the agent and a confidential informant who testified as a witness for petitioner at the suppression hearing. Assuming for the sake of argument that *Brady v. Maryland*, 373 U.S. 83 (1963), applies to suppression hearings, petitioner had no due process right to production of the notes and memorandums unless they contained information that was favorable to petitioner and "material either to guilt or punishment." *Id.* at 87. See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). There is no foundation for petitioner's assertion that the notes and memorandums were *Brady* material. The court of appeals rejected petitioner's due process claim and there is nothing in the record to indicate that the notes and memorandums contained any material evidence favorable to petitioner. In addition, the government reviewed the notes and memorandums and informed the court of appeals that it did not believe they contained any *Brady* material. See Gov't C.A. Br. 49 n.36. Further review is not warranted.⁵

⁵ Petitioner waived his rights under Fed. R. Crim. P. 12(i) and 26.2 to production of any witness statements contained in these materials. Not only did petitioner fail to file an objec-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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tion with the district court on this issue, see *Thomas v. Arn*, 474 U.S. 140, 147-148 (1985) (rule precluding appellate review of any issue not contained in objections to magistrate's report prevents a litigant from "sandbagging" the district court by failing to object and then appealing), he affirmatively conceded to the district court that he was not entitled to production of the agent's notes. See R. 59, at 27 ("notes of interviews with government witnesses are not technically discoverable at this stage of the proceedings.")

